

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 03-35002

DAVID H. DUNAWAY
d/b/a DAVID H. DUNAWAY & ASSOCIATES
SUSAN R. DUNAWAY

Debtors

**MEMORANDUM ON ADEQUACY OF DEBTORS' SECOND AMENDED
DISCLOSURE STATEMENT DATED SEPTEMBER 13, 2004**

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

Before the court is the adequacy of the Debtors' Second Amended Disclosure Statement Dated September 13, 2004 (Second Amended Disclosure Statement). The Objection of Union Planters, N.A. to Debtor's Second Amended Disclosure Statement (Objection) was filed on September 14, 2004.¹ On September 16, 2004, the court held a hearing on the adequacy of the Second Amended Disclosure Statement and reserved decision to allow the Debtors an opportunity to file a response to Union Planters' Objection. The Debtors filed their Response to the Objection of Union Planters, N.A. to the Debtors' Second Amended Disclosure Statement (Response) on September 22, 2004.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (O) (West 1993).

I

The Debtors filed their Second Amended Plan of Reorganization (Second Amended Plan), along with the Second Amended Disclosure Statement on September 13, 2004. The Objection filed by Union Planters is based upon the averments that the Second Amended Disclosure Statement: (1) fails to account for exemptions exceeding the allowable limits pursuant to Tennessee Code Annotated section 26-2-103; (2) fails to account for the going concern value of Mr. Dunaway's law practice; (3) fails to address the effect of the United States Trustee's objection to the Debtors' claimed 401(k) exemption in the amount of \$485,000.00; (4) fails to take into consideration tax consequences concerning Mr. Dunaway's

¹ An objection to the Debtors' Disclosure Statement filed by the United States Trustee on July 7, 2004, was withdrawn on September 14, 2004, following the filing of the Second Amended Disclosure Statement. A second Withdrawal of U.S. Trustee's Objections to Debtor's [sic] Disclosure Statement was filed on September 17, 2004.

401(k) loans; (5) fails to disclose Mr. Dunaway's failure to pay quarterly income tax payments to the Internal Revenue Service; and (6) fails to inform creditors that the Debtors' Second Amended Plan is not feasible.

In their Response, the Debtors assert that the Disclosure Statement is adequate because (1) they have not claimed exemptions in excess of the limits allowed under Tennessee law; (2) they have fully set forth the details concerning the value of Mr. Dunaway's law practice; (3) they have fully disclosed the details of the United States Trustee's objection to the claimed exemptions; (4) there has been no determination by the Internal Revenue Service that the Debtors owe taxes with respect to their pension plans; (5) the Debtors' monthly operating reports evidence that Mr. Dunaway has made his quarterly tax payments to the Internal Revenue Service; and (6) they have provided sufficient information to show that they can make their proposed payments and that the Second Amended Plan is feasible. Additionally, the Debtors point out that the United States Trustee has withdrawn his objection and the Internal Revenue Service did not file an objection to the adequacy of the Second Amended Disclosure Statement.

II

The Second Amended Disclosure Statement is governed by 11 U.S.C.A. § 1125(b), which provides that:

An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the

plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets.

11 U.S.C.A. § 1125(b) (West 1993). As it pertains to § 1125, subsection (a) provides the following definitions:

(a) In this section—

(1) “adequate information” means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan; and

(2) “investor typical of holders of claims or interests of the relevant class” means investor having—

(A) a claim or interest of the relevant class;

(B) such a relationship with the debtor as the holders of other claims or interests of such class generally have; and

(C) such ability to obtain such information from sources other than the disclosure required by this section as holders of claims or interests in such class generally have.

11 U.S.C.A. § 1125(a) (West 1993).

The court must determine adequacy on a case-by-case basis. *In re Scioto Valley Mortgage Co.*, 88 B.R. 168, 170 (Bankr. S.D. Ohio 1988). Most courts consider the following, non-exhaustive list in making their determination of adequacy:

(1) the circumstances that gave rise to the filing of the bankruptcy petition; (2) a complete description of the available assets and their value; (3) the

anticipated future of the debtor; (4) the source of the information provided in the disclosure statement; (5) a disclaimer, which typically indicates that no statements or information concerning the debtor or its assets or securities are authorized, other than those set forth in the disclosure statement; (6) the condition and performance of the debtor while in Chapter 11; (7) information regarding claims against the estate; (8) a liquidation analysis setting forth the estimated return that creditors would receive under Chapter 7; (9) the accounting and valuation methods used to produce the financial information in the disclosure statement; (10) information regarding the future management of the debtor, including the amount of compensation to be paid to any insiders, directors, and/or officers of the debtor; (11) a summary of the plan of reorganization; (12) an estimate of all administrative expenses, including attorneys' fees and accountants' fees; (13) the collectibility of any accounts receivable; (14) any financial information, valuations or *pro forma* projections that would be relevant to creditors' determinations of whether to accept or reject the plan; (15) information relevant to the risks being taken by the creditors and interest holders; (16) the actual or projected value that can be obtained from avoidable transfers; (17) the existence, likelihood and possible success of non-bankruptcy litigation; (18) the tax consequences of the plan; and (19) the relationship of the debtor with affiliates.

Scioto Valley Mortgage Co., 88 B.R. at 170-71 (citations omitted). “In short, a proper disclosure statement must clearly and succinctly inform the average unsecured creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution.” *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991). Generally, other issues are left for confirmation; however, it is sometimes appropriate to find a disclosure statement inadequate “where it describes a plan of reorganization which is so fatally flawed that confirmation is impossible.” *In re Cardinal Congregate I*, 121 B.R. 760, 764 (Bankr. S.D. Ohio 1990).

III

Union Planters' Objection can be grouped into four primary arguments: (1) first, that the Debtors have not disclosed adequate information regarding the contested matter currently pending with the United States Trustee concerning exemptions claimed; specifically, that the Debtors have disqualified their pension plans by taking prohibited loans for impermissible purposes and that the Second Amended Disclosure Statement fails to address tax consequences for the contributions made to those pension plans; (2) that the Debtors did not disclose that Mr. Dunaway has failed to pay quarterly tax payments to the Internal Revenue Service for 2004; (3) that the Second Amended Disclosure Statement does not adequately provide a going concern value for Mr. Dunaway's law practice; and (4) that the Second Amended Plan is not feasible.

In response, the Debtors make the following averments: (1) that they have fully disclosed the exemption issues pending with the United States Trustee; (2) that between January 2004 and August 2004, they paid in excess of \$124,000.00 to the Internal Revenue Service for income tax payments, in addition to another \$15,000.00 payment in September 2004, and that their pre-petition tax arrearage is addressed in the Second Amended Disclosure Statement; (3) that they have fully disclosed the nature of Mr. Dunaway's contingency fee practice and the estimated income and expenses based upon previous years as well as those figures for 2004 through August 31, 2004; and (4) that the Second Amended Plan is feasible.

The court agrees with the Debtors and finds that each of the issues raised by Union Planters is expressly addressed within the Second Amended Disclosure Statement or are issues concerning confirmation issues rather than disclosure issues. First, the Second Amended Disclosure Statement discusses both the pending contested matter with the United States Trustee and the possibility of settlement of those issues. It also expressly provides that in the event that the claimed exemptions are not allowed, those funds will be available for payments to unsecured creditors. The court also finds it relevant that the United States Trustee has withdrawn his objection to the adequacy of the Second Amended Disclosure Statement.

Second, the Second Amended Disclosure Statement fully discloses the relevant information concerning Mr. Dunaway's law practice. Attached as part of Exhibit 1 is a breakdown of the income and expenses for the law practice for the period of January 1 through August 31, 2004, showing a cash basis net income for that period of \$258,036.16. Additionally, the Second Amended Disclosure Statement gives Mr. Dunaway's specific net income information for 2002 and 2003, and details the risks and benefits associated with accepting cases on a contingency fee basis.

Third, the Second Amended Disclosure Statement adequately reflects funds for payment of Mr. Dunaway's quarterly income taxes, as well as his treatment of pre-petition taxes owed to the Internal Revenue Service as Class 2. Exhibit 3 to the Second Amended Disclosure Statement consists of the Debtors' monthly income and expenses, as reflected in their amended statements and schedules. The monthly expenses include expenditures of

\$5,000.00 for federal income taxes and \$1,500.00 for self-employment and medicare taxes. Moreover, as pointed out by the Debtors in their Response, the Internal Revenue Service has not objected to the adequacy of the Second Amended Disclosure Statement, indicating that Mr. Dunaway's 2004 taxes are being paid.

Fourth, feasibility is a confirmation issue, not an adequacy issue. Accordingly, the court finds that Union Planters' Objection is without merit, and its concerns should be more properly addressed at confirmation.

An order consistent with this Memorandum will be entered.

FILED: October 6, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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DAVID H. DUNAWAY
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SUSAN R. DUNAWAY

Debtors

ORDER

For the reasons set forth in the Memorandum on Adequacy of Debtors' Second Amended Disclosure Statement dated September 13, 2004, filed this date, the court directs the following:

1. The Objection of Union Planters, N.A. to Debtors' Second Amended Disclosure Statement filed on September 14, 2004, is OVERRULED.

2. The Debtors' Second Amended Disclosure Statement Dated September 13, 2004, filed by the Debtors on September 13, 2004, is approved.

SO ORDERED.

ENTER: October 6, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE